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900059-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 900059-CA
v.	:	
ROBERT E. HORNER,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF TWO COUNTS OF UNLAWFUL DISTRIBUTION OF A CONTROLLED SUBSTANCE, A SECOND DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE LEONARD H. RUSSON, PRESIDING

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DEC 3 1992

Clerk
Utah Court of Appeals

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from convictions of two counts of unlawful distribution of a controlled substance, a second degree felony, under Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1988).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

The issues presented on appeal are:

1. Does the evidence establish that defendant was entrapped as a matter of law?

When presented with an entrapment claim, a reviewing court will affirm a conviction unless the evidence, viewed in the light most favorable to the jury verdict, leaves no reasonable doubt that the defendant was entrapped as a matter of law. State v. Udell, 728 P.2d 131, 133 (Utah 1986).

2. Was defendant denied effective assistance of counsel at trial based solely on the disbarment of his attorney

after defendant's trial?

An ineffective assistance of counsel claim generally presents a mixed question of fact and law. State v. Templin, 805 P.2d 182, 186 (Utah 1990). However, when as here the issue is presented for the first time on appeal, without an evidentiary hearing having been conducted below, the ineffectiveness claim presents a question of law reviewed on the record of the underlying trial. See State v. Humphries, 818 P.2d 1027 (Utah 1991). A defendant must show both that counsel rendered deficient performance in some demonstrable manner and that a reasonable probability exists that but for counsel's deficient performance, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Carter, 776 P.2d 886, 893 (Utah 1989).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes, or rules pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

The State charged defendant with two counts of unlawful distribution of a controlled substance (cocaine), or agreeing, consenting, or arranging to distribute a controlled substance (cocaine), a second degree felony, under Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1988) (R. 10-12).

Before trial, defendant moved the trial court to determine whether he was entrapped as a matter of fact and law

(R. 36). The court, concluding that it could not find entrapment as a matter of law, ruled that defendant would have to present the issue to the jury (Transcr. of Nov. 30, 1989 hearing at 98; R. 48).

A jury convicted defendant of both counts, implicitly rejecting his entrapment defense (R. 103-104). The trial court sentenced defendant to concurrent terms of one to fifteen years at the Utah State Prison on both counts, fined him a total of $10,000 plus a 25% surcharge, and ordered him to pay $1,060 in restitution (R. 121-22). However, the court stayed execution of the prison sentence and placed defendant on thirty-six months' probation (id.).

Defendant's trial counsel filed an appeal but failed to file a brief. This resulted in dismissal of the appeal (R. 143). However, this Court granted defendant's motion to reinstate his appeal, which is now before the Court on defendant's pro se brief.

STATEMENT OF FACTS

A statement of facts beyond that which appears above in the Statement of the Case is not necessary to the resolution of the issues presented on appeal.

SUMMARY OF ARGUMENT

Defendant's failure to provide this Court with a trial transcript precludes consideration of his claims that he was entrapped as a matter of law and that the evidence is insufficient to prove he had the requisite criminal intent.

To prevail on either claim, defendant must marshal all the evidence supporting the jury's verdict and then show how this marshalled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict. Also, the rules of appellate procedure require that defendant support all factual assertions in his brief with references to the record. He fails to satisfy either of these requirements due to the absence of a trial transcript.

Defendant's ineffective assistance of counsel claim lacks merit. He neither identifies deficient performance by his trial counsel nor demonstrates any prejudice flowing therefrom. Furthermore, he does not establish a factual basis upon which this Court could find a *per se* violation of the Sixth Amendment; the mere fact that trial counsel was disbarred after defendant's trial does not constitute *per se* ineffective assistance.

ARGUMENT

POINT I

DEFENDANT FAILS TO SHOW THAT THE EVIDENCE ESTABLISHES THAT HE WAS ENTRAPPED AS A MATTER OF LAW OR THAT THE EVIDENCE IS INSUFFICIENT TO PROVE CRIMINAL INTENT

Under the heading "Entrapment," defendant argues both that he was entrapped as a matter of law and that the evidence is insufficient to prove he acted with the requisite criminal intent. Br. of Appellant at 6-11. His argument fails in both respects.

A. Standard of Review

As noted above, prior to trial defendant moved the trial court to determine the entrapment question (R. 36). See

Utah Code Ann. § 76-2-303(4) (1990). After hearing evidence, the court concluded that it could not find entrapment as a matter of law and ruled that defendant would have to present the issue to the jury (Transcr. of Nov. 30, 1989 hearing at 98; R. 48). At trial, defendant presented an entrapment defense (see Jury Instructions Nos. 11 and 12 (R. 89-90)), which the jury implicitly rejected when it convicted him. Under these circumstances, defendant's entrapment argument on appeal is considered a challenge to the jury verdict, even though he argues that he was entrapped "as a matter of law." See, e.g., State v. Moore, 782 P.2d 497, 499, 501 (Utah 1989); State v. Martin, 713 P.2d 60, 61 (Utah 1986).

When presented with an insufficient evidence claim, an appellate court "'review[s] the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict'" and will reverse a jury conviction "'only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.'" State v. Hamilton, 827 P.2d 232, 236 (Utah 1992) (quoting State v. Booker, 709 P.2d 342, 345 (Utah 1985)).

Furthermore, when challenging the sufficiency of the evidence, the "defendant must 'marshal all evidence *supporting* the jury's verdict and must then show how this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict.'" State v. Scheel, 823 P.2d 470, 472 (Utah App. 1991) (quoting State v. Perdue, 813 P.2d

1201, 1207 (Utah App. 1991)).

When reviewing an entrapment claim, an appellate court will affirm the conviction unless the evidence leaves no reasonable doubt that the defendant was entrapped as a matter of law. State v. Udell, 728 P.2d 131, 133 (Utah 1986).

B. Entrapment

Defendant has not provided this Court with a trial transcript. The appellate record contains only a transcript of the pretrial entrapment hearing. Thus, in challenging the jury's verdict and its implicit rejection of his entrapment defense, defendant does not satisfy the marshalling requirement or referred to the record as required by rule 24(e), Utah Rules of Appellate Procedure, see Koulis v. Standard Oil Co., 746 P.2d 1182, 1184 (Utah App. 1987) ("'This Court need not, and will not, consider any facts not properly cited to, or supported by, the record.'" (quoting Uckerman v. Lincoln Nat'l Life Ins. Co., 588 P.2d 142, 144 (Utah 1978)). At bottom, defendant's failure to provide a trial transcript on appeal precludes consideration of his claim that the evidence demonstrates entrapment as a matter of law. State v. Robbins, 709 P.2d 771, 773 (Utah 1985) (defendant's failure to provide trial transcript on appeal precluded consideration of his claim of error).[1]

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[1] Defendant's failure to provide a trial transcript on appeal illustrates one of the hazards of pursuing an appeal without counsel, as defendant has chosen to do here. He obviously is not aware of the applicable standards of review, the requirements of the rules of appellate procedure, or the importance of providing a complete record on appeal.

Although the record contains correspondence between defendant and the court reporter which refers to trial

C. Sufficiency of Evidence on Intent

Defendant's failure to provide a trial transcript on appeal also precludes consideration of his argument that the evidence is insufficient to prove he had the requisite criminal intent.

POINT II

DEFENDANT FAILS TO SHOW THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

A defendant who raises a claim of ineffective assistance of counsel must show both that counsel rendered a deficient performance in some demonstrable manner and that a reasonable probability exists that but for counsel's deficient performance, the result would have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Carter, 776 P.2d 886, 893 (Utah 1986). A "[d]efendant must prove that specific, identified acts or omissions fall outside the wide range of professionally competent assistance. The claim may not be speculative, but must be a demonstrative reality[.]" State v. Frame, 723 P.2d 401, 405 (Utah 1986) (per curiam). Here, defendant fails to meet either prong of the Strickland standard.

Without identifying any specific acts or omissions of trial counsel that would constitute deficient performance, or alleging prejudice from any deficient performance, defendant argues that he received *per se* ineffective assistance because his

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transcripts (R. 183-84), there is no indication that defendant made any effort to comply with the transcript filing requirements of rule 11, Utah Rules of Appellate Procedure. This Court fully advised him of those requirements in a letter dated April 20, 1992 (R. 187-88).

counsel was disbarred after defendant's trial. Defendant does not disclose, and it appears he does not know, the reason for counsel's disbarment. See Br. of Appellant at 13 ("Whatever this attorney was doing during the latter half of 1989, it led to his dis-barmen [sic] . . . .).

Defendant cites a panel decision of the Second Circuit Court of Appeals, Bellamy v. Cogdell, 952 F.2d 626 (2nd Cir.), vacated on reh'g, 974 F.2d 302 (2nd Cir. 1992) (en banc), as authority for application of a *per se* rule. He fails to note or discuss the en banc Second Circuit opinion which vacated the panel opinion and concluded that, under the facts of the case, the *per se* rule did not apply. See Bellamy v. Cogdell, 974 F.2d 302 (2nd Cir. 1992) (en banc). However, even if this Court were to accept the rejected analysis of the panel decision in Bellamy, the facts of that case, as outlined by the panel, are clearly distinguishable.[2]

There, defense counsel was charged with professional misconduct prior to Bellamy's trial for murder and criminal possession of a weapon. 952 F.2d at 627. In answering the charges, counsel implicitly admitted that due to physical and mental difficulties he was incapable of practicing law. Id. at 628. Nevertheless, having promised the disciplinary committee that he would not go to trial without the assistance of another attorney, counsel proceeded alone to represent Bellamy at trial without disclosing the misconduct charges or his admitted

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[2] A strong dissent, which adopted the panel's analysis, was filed in the en banc decision. Bellamy, 974 F.2d at 309-13.

incapacity to his client. Ibid. Shortly after being convicted, Bellamy learned of his counsel's problems -- which then included an indefinite suspension as an attorney based on counsel's incapacity to practice law -- and sought relief from both his conviction and sentence on the ground that he had been denied effective assistance of counsel at trial. Ibid. Ultimately, the Second Circuit panel granted Bellamy a writ of habeas corpus, holding that his case was within a small class of cases where the Strickland two-pronged test does not apply and ineffective assistance is presumed. Id. at 631.

Following the analysis in several prior Second Circuit cases, the panel reasoned that the facts of Bellamy's case constituted a *per se* violation of the Sixth Amendment right to counsel because "the defect which led to [counsel's] suspension was 'a serious substantive flaw, [such as] . . . a demonstrated inability to meet the threshold criteria of competence in the law.'" Id. at 631 (quoting United States v. Novak, 903 F.2d 883, 888 (2nd Cir. 1990)) (second alteration in original). The panel said:

> Had [counsel] been suspended solely for the financial charges originally brought against him, . . . we might well have upheld Bellamy's conviction. But when an attorney is admittedly incapable of preparing for a hearing to be held a week or two before a criminal trial, when that incapacity is the ground for suspension from practice shortly after the trial, when that suspension would almost certainly have occurred prior to the criminal trial but for an unfulfilled promise to be assisted by competent counsel during the trial, and when the attorney's client is ignorant of all of this, we feel obligated by our cases to hold on such unusual facts that the client has been denied the effective

> assistance of counsel guaranteed a defendant by the Constitution.

Ibid. (Of course, the en banc decision rejected this reasoning.)

Defendant makes no claim that during trial his attorney had a disabling condition like that present in Bellamy. Nor does he claim there was a "serious substantive flaw" similar to that present in other Second Circuit cases, relied on by the panel in Bellamy, where a *per se* Sixth Amendment violation was found: United States v. Novak, 903 F.2d 883 (2nd Cir. 1990) (defense counsel, although licensed to practice law during defendant's trial, had fraudulently obtained his license); United States v. Cancilla, 725 F.2d 867 (2nd Cir. 1984) (defense counsel, unknown to defendant, participated in criminal conduct related to the conduct for which defendant was convicted; this conflict of interest denied defendant his right to counsel at trial); Solina v. United States, 709 F.2d 160 (2nd Cir. 1983) (defense counsel was unlicensed and lack of license was based on failure to seek license or denial for reason going to legal ability).

Indeed, defendant's case may be similar to two cases the Bellamy panel distinguished. In Waterhouse v. Rodriquez, 848 F.2d 375 (2nd Cir. 1988), the court refused to find a *per se* Sixth Amendment violation where counsel was disbarred after representing the defendant at a hearing to determine whether the defendant's confession was voluntary. The attorney was disbarred for misappropriating client funds and for failing to represent clients after accepting fees. 848 F.2d at 378. As the Bellamy panel noted, "[N]either of these bases of disbarment called into question the attorney's competence to practice law at the time he

was representing Waterhouse. . . . It was therefore not considered pertinent to the defendant's representation at the confession hearing that his attorney was disbarred." 952 F.2d at 631.

Likewise, the Second Circuit refused to find a *per se* Sixth Amendment violation in United States v. Aiello, 900 F.2d 528 (2nd Cir. 1990), where defense counsel "was under investigation by the Organized Crime Strike Force for the Eastern District of New York before and during the proceedings against the defendant." Bellamy, 952 F.2d at 631. "[A]s in Waterhouse, '[the attorney's] purported crimes were totally unrelated to the crimes for which [the defendant] was being tried'[;] [t]here was similarly no evidence that the attorney was incompetent to practice law." Ibid. (quoting Waterhouse, 900 F.2d at 531) (first alteration added).

Without identifying the basis for his attorney's disbarment, defendant is unable to avail himself of the Bellamy panel's holding. Contrary to the facts of Bellamy, defendant's situation may be like that of the defendants in Waterhouse and Aiello, where there was no Sixth Amendment violation. Defendant simply fails to carry his burden of showing that he was denied effective assistance of counsel at trial based solely on the post-trial disbarment of his attorney. As the en banc decision in Bellamy makes clear, the *per se* rule is applied in very limited circumstances and "'without enthusiasm.'" 974 F.2d at 306 (quoting Aiello, 900 F.2d at 532).

Finally, defendant also alleges that his counsel (1)

promised him that the "case was 'in the bag' because the [trial judge] was [counsel's] former law partner," and (2) during trial discussed with the prosecutor possible employment as counsel for "the Special Drug Task Force." Br. of Appellant at 14. Insofar as defendant intends for these allegations to form the basis of an ineffectiveness claim, they are not supported by any record evidence and therefore cannot be considered. See State v. Jones, 823 P.2d 1059, 1063 (Utah 1991) (because nothing in the record supported defendant's claim of a Miranda violation, defendant had failed to carry his burden of establishing ineffective assistance of counsel); State v. Colonna, 766 P.2d 1062, 1068 (Utah 1988) ("Defendant may not prevail on ineffectiveness claims where he has raised only the possibility of ineffective assistance of counsel but failed to offer evidence thereon."); State v. Hoyt, 806 P.2d 204, 212 (Utah App. 1991) ("The record before us is inadequate to resolve defendant's claim that counsel failed to object to certain evidence . . . ."). See also State v. Bingham, 684 P.2d 43, 46 (Utah 1984) ("This Court will not rule on matters outside the trial court record.").

CONCLUSION

Based on the foregoing arguments, this Court should affirm defendant's convictions.

RESPECTFULLY submitted this 3rd day of December, 1992.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Robert E. Horner, P.O. Box 655, Panguitch, Utah 84759, this 3rd day of December, 1992.

David B. Thompson